Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

EBEN ALEXANDER III, M.D.,
Petitioner,

v.

BRIGHAM AND WOMEN'S PHYSICIANS ORGANIZATION, INC., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition raises the unsettled and important question of what are the essential elements of a deferred compensation plan to qualify for "top hat" exemption under ERISA. "Top hat" plans are exempt from the protections afforded employee retirement funds under ERISA, including those protections relating to participation, vesting, funding, and fiduciary requirements. To qualify for "top hat" exemption, a plan must be "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." *See* 29 U.S.C. §1051(2), § 1081(a)(3), and §1101(a)(1) (emphasis added).

Rooted in ERISA's purpose to afford protection to employee pension funds and the Department of Labor's interpretation of the top hat exemption, the Sixth Circuit and a long line of federal cases have held that employees covered by top hat plans must have the ability to bargain with their employer over the terms of the plans. In conflict with the Sixth Circuit and the existing body of top hat law, the First Circuit has now held in the case at bar that bargaining power is not a requirement for a valid top hat plan. The First Circuit's decision below also conflicts with the Second and Sixth Circuits with regard to which employees should be included in the "select group" analysis. Thus, the questions presented by this petition are:

1. Whether a group of employees that lack the ability to influence the terms, operation and conditions of a plan and thereby protect their interests through

bargaining constitutes a "select group" for purposes of satisfying the "top hat" exemption under ERISA?

2. Whether the "select group" for purposes of analyzing the validity of a top hat plan is measured by all employees to whom the plan is offered, rather than by only those employees who actually contribute to the plans?

LIST OF PARTIES

Petitioner is Eben Alexander, III, M.D. Respondents are Brigham and Women's Physicians Organization, Inc., Boston Neurosurgical Foundation, Inc., Brigham Surgical Group Foundation, Inc. Deferred Compensation Plan, Brigham Surgical Group Foundation, Inc. Faculty Retirement Benefit Plan, Committee on Compensation of the Brigham Surgical Group Foundation, Inc., and Peter Black, M.D.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *Alexander v. Brigham and Women's Physicians Organization, Inc.*, 513 F.3d 37 (1st Cir. 2008). The First Circuit affirmed the December 26, 2006 decision of the United States District Court for the District of Massachusetts reported at 467 F. Supp.2d 136 (D. Mass. 2006). *See Appendices A and B.*

STATEMENT OF JURISDICTION

The First Circuit entered judgment on January 23, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The "top hat" exemption appears in three sections of ERISA at 29 U.S.C. §1051(2), § 1081(a)(3), and §1101(a)(1). Those provisions state in relevant part as follows:

29 U.S.C. § 1051(2)

"This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than--...(2) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees."

29 U.S.C. § 1081(a)(3)

"This part shall apply to any employee pension benefit plan described in section 1003(a) of this title, (and not exempted under section 1003(b) of this title), other than--...; (3) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees..."

29 U.S.C. §1101(a)(1)

"This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title), other than--(1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;..."

STATEMENT OF THE CASE

Plaintiff/Petitioner Dr. Eben Alexander filed this action in April 2001 challenging the actions of his former employer, defendant Brigham and Women's Physician's Organization, Inc., successor to the Brigham Surgical Group Foundation, Inc. (together, "BSG"), who seized $441,000 in pension funds that Dr. Alexander had earned and accrued in two separate deferred compensation plans.[1] BSG reclaimed these

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[1] Dr. Eben Alexander invoked 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331 as the grounds for jurisdiction in the district court to assert his ERISA claims.

funds, which otherwise would have been vested under ERISA, pursuant to a forfeiture provision in the deferred compensation plans which the BSG claimed were valid top hat plans.

There is no Congressional legislative history elucidating the purpose of the top hat exemption, nor has this Court spoken on the issue. The most authoritative guidance for the past thirty-five years has been the Department of Labor, which has explained by way of an agency opinion that the rationale underlying the top hat exemption is that employees covered by such plans have the ability to influence their employer and do not require the usual protections afforded by ERISA. *See* Department of Labor Opinion Letter No. 90-14A ("DOL Op. No. 90-14A"). (*See Appendix C*).

In this case, however, it is undisputed that (i) Dr. Alexander lacked any power on his own to bargain, negotiate, or influence BSG with respect to the terms of these retirement plans (including the forfeiture provision); and (ii) Dr. Alexander was subject to the plans as a condition of his employment. Therefore, Dr. Alexander argued that the BSG plans were not valid top hat plans because the employees covered by these plans lacked bargaining power and also because the plans were not intended for a "select group." Without the benefit of the top hat exemption, BSG had no right to seize these funds because Dr. Alexander's monies in the plans would have vested pursuant to ERISA's vesting provision. 29 U.S.C. §1053. Accordingly, the principal question for review is what are the specific criteria to establish a deferred compensation plan that

is exempted from the ERISA provisions that protect employees against benefit forfeitures.

I. Factual Background

A. The Plans and Their Definition of "Participant"

The essential facts are undisputed. BSG hired Dr. Alexander as a neurosurgeon in 1988. (*App. 3a*). BSG was a non-profit, tax-exempt corporation organized to carry out the purposes of Harvard Medical School. (*App. 56a*). BSG's function was to teach surgery, train residents, and conduct the Department of Surgery at the Brigham and Women's Hospital. (*Id.*). Like all BSG surgeons, Dr. Alexander's compensation was determined in accordance with BSG's Professional Staff Compensation Policy ("Compensation Policy"). (*Appendix F*). The stated objective of the BSG Compensation Policy was "[t]o provide a system of compensation that will enable the acquisition and retention of a professional staff of national and international stature and assure a balanced program of care, teaching and research." (*App. 75a*). Compensation paid to members of BSG's professional staff was subject to a salary cap set forth in the Harvard System of Titles, Appointments and Compensation Arrangements for the Faculty of Medicine of Harvard University. (*Id.*). Each year, surgeons were assessed a practice surplus or deficit, depending upon whether a surgeon's net practice income (total income less expenses) or "NPI" exceeded a surgeon's salary for that particular year. (*App. 85a-86a*).

Integral to BSG's compensation scheme were two unfunded deferred compensation plans for all of its surgeons: the Unfunded Deferred Compensation Plan ("UDC") and the Faculty Retirement Benefit Plan ("FRBP") (together, the "BSG plans"). (*Appendices D and E*). Participation in the BSG plans was mandatory and all BSG surgeons were required to contribute to the UDC and FRBP pursuant to the Compensation Policy if a surgeon's net practice income exceeded the Harvard salary cap. (*App. 6a; 79a-80a*). Surgeons with a practice surplus would receive contributions equal to 25% of their total salary in their FRBP account first, and then receive contributions equal to 50% of their remaining surplus in their UDC account. (*App. 4a; 79a-80a*). The First Circuit recognized the mandatory nature of the plans: "As written, the plans afforded no option for any surgeon to opt out." *Alexander*, 513 F.3d at 41 (emphasis added) (*App. 6a*).

The First Circuit also noted that "the plans covered all full-time BSG surgeons who held Harvard faculty appointments." *Alexander*, 513 F.3d at 41 (*App. 6a*) (emphasis added). This was evident by the language of the plans. In particular, Section 1.2 of the UDC provided:

> The "Employees" are surgeons who are members of the full-time faculty of the Harvard Medical School and are employed by the Employer to perform and teach surgery in the clinical setting of the Brigham and Women's Hospital by collaborating with students and residents in the practice of surgery, in research, and in the development of theory. The

> Employees are paid by the Employer which (with few exceptions) is their only source of earned income and which is required to observe certain limitations imposed by the Harvard Medical School on total compensation which may be earned by members of its full-time faculty.

(*App. 56a-57a*).

Likewise, section 2.01 of the FRBP defined "Eligibility" as follows: "Participants hereunder shall all be employees of the Employer who are members of the full-time faculty of the Harvard Medical School.[2] (*App. 66a*).

For the years in question (1997-1999), the surgeons who at the beginning of the year were eligible to contribute to the UDC and FRBP ranged between 27.2% and 32.4% of BSG's total workforce. Notably, the First Circuit acknowledged that this large percentage would not constitute a "select group" under the statute. *Alexander*, 513 F.3d at 40-41 (*App. 5a, 12a*).

B. Dr. Alexander Lacked Bargaining Power

It was undisputed that although all surgeons were eligible to contribute to the plans, no individual

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[2] Unlike the UDC, the FRBP "provided that the Committee on Compensation of the Employer (the 'Committee') may limit participation in order to fulfill the intent set forth in Section 5.02." (*App.* 692 at § 2.01).

surgeon had the power to negotiate the terms of the plans. Indeed, both the district court and the First Circuit specifically recognized that Dr. Alexander lacked individual bargaining power. The district court stated:

> Alexander did not, however, have the opportunity or ability to decline to contribute to the FRBP or UDC if he earned enough to do so. Nor did he alone have the ability to negotiate modifications to either plan. Rather, if Alexander wanted to be a member of BSG and of the Harvard Medical School faculty, he had to accept the terms of those plans.

Alexander, 467 F. Supp.2d at 140 (*App. 30a*) (emphasis added). Similarly, the First Circuit acknowledged, "because they [the plans] were already in place when the appellant joined BSG, he had no real opportunity to bargain over their terms." *Alexander*, 513 F.3d at 41 (*App. 6a*).

II. The District Court's Findings and Conclusions

After a bench trial, the district court made three notable findings: (i) "[a]ll surgeons who were full-time faculty of the Harvard Medical School were eligible to contribute to the FRBP and the UDC"; (ii) the surgeons who could have earned enough to contribute to the UDC and FRBP constituted about 30% of BSG's total workforce; and (iii) Dr. Alexander had no "ability to negotiate modifications to either plan." *Alexander*, 467 F. Supp.2d at 140 (*App. 30a-32a*).

Despite these findings, the district court concluded that the UDC and FRBP were valid top hat plans. In the process, the district court disagreed with the Second Circuit and other district courts regarding the relevant pool of employees in measuring "select group" and whether bargaining power is an essential element of a valid top hat plan. *Compare Alexander*, 467 F. Supp.2d at 143 (*App. 38a*) ("in the circumstances of this case it is not appropriate to focus on all BSG surgeons to define the [select] group.") *with Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283, 285 (2d Cir. 2000) (plan measured by percentage of total workforce to whom it was offered, not who actually contributed to plan); *compare Alexander*, 467 F. Supp.2d at 147 (*App. 47a*) ("[i]n essence, Alexander asks this court to follow the district court in [*Darden*] and apply the §1002(7) definition of participant for the purpose of determining whether the FRBP and UDC were maintained only for a select group. . . It is not, however, appropriate to do so.") *with Darden v. Nationwide Mut. Ins. Co.*, 717 F. Supp. 388, 396-97 (E.D.N.C. 1989) (employees who "may become eligible" for benefits must be included in defining the "select group") (emphasis in original) *aff'd*, 922 F.2d 203 (4th Cir. 1991), *rev'd on other grounds*, 503 U.S. 318 (1992).

In addition, the district court disagreed with the Sixth Circuit and other lower courts on the issue of bargaining power. *Compare Alexander*, 467 F. Supp.2d at 145 (*App. 43a*) ("[h]owever to the extent, if any, that other courts have interpreted §1051(2) to require a showing that an individual such as Alexander had actual, individual bargaining power sufficient to negotiate the terms of an unfunded deferred compensation plan, this court respectfully

disagrees.") *with Guiragoss v. Khoury*, 444 F. Supp.2d 649, 661 (E.D.Va. 2006) ("A third requirement [for a valid top hat plan], provided by DOL advisory opinions, is that the select group consist of individuals who are in the position to protect their own interests.").

III. The First Circuit Decision

The First Circuit adopted the district court's findings of fact and affirmed the district court's ruling that the plans were valid top hat plans. In so doing, the First Circuit's decision conflicts with the Sixth Circuit decision in *Bakri v. Venture Mfg. Co.*, 473 F.3d 677 (6th Cir. 2007)[3] and many district courts which have identified bargaining power as an essential element in the top hat analysis. The First Circuit stated:

> Insofar as these cases adumbrate a hard-and-fast requirement that individual top-hat plan beneficiaries must have bargaining power, they all ultimately derive that requirement from the DOL opinion letter.
>
> We decline the appellant's invitation to depart from the plain language of the statute and jerry-build onto it a requirement of individual bargaining power. The DOL opinion letter speaks only to Congress' rationale for enacting the top-hat provision. It does not present itself as an interpretation of the provision's

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[3] *Bakri* was decided after the district court issued its decision.

> requirements, nor does it make any mention of the need for or propriety of demanding that employers demonstrate their employees' ability to negotiate the terms of deferred compensation plans.

Alexander, 513 F.3d at 47 (*App.* 19*a*).

The First Circuit's decision also conflicts with the Second Circuit in determining which group of employees must be considered when measuring whether the group is "select." Affirming the district court, the First Circuit held that only those employees who actually contributed to the BSG plans should be included in the analysis:

> Thus, for the purpose of determining whether a plan services a select group, we find relevant here only those employees who actually earned enough NPI [net practice income] to fund plan contributions. They are the employees for whom the money in the plans is being managed and held; they are thus the employees whom Congress had in mind when it devised the contours of the top-hat carve-out.

Alexander, 513 F.3d at 44. (*App.* 13*a*). In stark contrast, the Second Circuit has held that the relevant group to include in order to measure "select group" is all employees to whom the plan is offered. *Demery*, 216 F.3d at 285, 289.

REASONS FOR GRANTING THE PETITION

The First Circuit's decision below creates conflicts and further ambiguity with two other circuits on two distinct issues relating to top hat plans: (i) whether bargaining power is a required element to establish a select group; and (ii) what is the appropriate pool of employees to include in the "select group" analysis. The criteria for determining whether a deferred compensation plan qualifies for the "top hat" exemption under ERISA is an important question affecting the rights of employees to their pension funds, including whether an employee's retirement funds are subject to forfeiture without the employee's ability to influence the retirement plan. Accordingly, this issue warrants this Court's guidance because ERISA's primary purpose is to protect employees' pension rights unless the plan falls within one of ERISA's limited exceptions.

The specific conflict at issue between the First and Sixth Circuits concerns whether employees who are covered by a top hat plan must have the ability to negotiate or bargain with their employer to be valid. The Sixth Circuit held that bargaining power is an aspect of the "selectivity" requirement of a top hat plan analysis, and relied upon ERISA's fundamental purpose and the rationale for the top hat exemption explained in DOL Op. No. 90-14A (*i.e.* that participants in the plan have the power to negotiate the terms of their deferred compensation plans with their employer). The First Circuit squarely held the opposite: that bargaining power is not part of the top hat analysis. Accordingly, review is warranted based on the conflict between the First and Sixth Circuits

regarding whether bargaining power is an essential element of a top hat plan. *See* Sup. Ct. R. 10(a). This issue also presents an important question of federal law that should be settled by this Court because of its wide-ranging effect on employee pension rights. *See* Sup. Ct. R. 10(c).

The second reason warranting review is that there is now a split between the First and Second Circuits regarding the relevant pool of employees to include when measuring whether those employees comprise a "select group," as required by the top hat provision. The First Circuit held below that only surgeons who actually contribute to the deferred compensation plans should be included for purposes of defining "select group." In contrast, the Second Circuit has held that all employees to whom the plan was offered is the relevant group to include quantitatively. The First Circuit's decision also contradicts prior lower court decisions -- cited by the Second Circuit -- recognizing that the statutory definition of "participant" includes employees who "may become eligible" for benefits, and therefore, all employees who may satisfy the eligibility criteria for contributions to the plans must be counted in determining whether the group is select. Accordingly, review by this Court is warranted to resolve the split between the First and Second Circuits regarding the employees who define the "select group" in a top hat analysis. *See* Sup. Ct. R. 10(a).

REVIEW IS WARRANTED TO DEFINE THE CRITERIA TO SATISFY THE TOP HAT EXEMPTION UNDER ERISA

I. The First Circuit Conflicts with the Sixth Circuit Regarding Whether Employees Subject to Top Hat Plans Must Have the Ability to Bargain with their Employer and Protect their Own Interests

The Sixth Circuit noted that an employee's ability to negotiate is part of the "selectivity" element of the top hat exemption. *See Bakri*, 473 F.3d at 680. In *Bakri*, the Sixth Circuit reversed summary judgment entered for the employer because the "selectivity" element of the top hat exception was missing where "the deferred compensation plan consisted of employees like [plaintiff], who had no supervisory, policy making, or executive responsibility, and had little ability to negotiate pension, pay or bonus compensation..." *Id.*

The Sixth Circuit's holding is derived from and supported by (i) the underlying purpose of ERISA; (ii) DOL Op. No. 90-14A; and (iii) a long line of federal cases interpreting the top hat provision. *See Alexander*, 513 F.3d at 47 (*App.* 19a), *citing Duggan v. Hobbs*, 99 F.3d 307, 312- 313 (9th Cir. 1996); *Guiragoss*, 444 F. Supp.2d at 658-59, 664; *Carrabba v. Randall Food Mkts., Inc.*, 38 F. Supp.2d 468, 477-78 (N.D. Tex. 1999); *Prior v. Innovative Communication Corp.*, 360 F. Supp. 2d 704, 713-714 (D.V.I. 2005).

First, the bargaining power requirement is rooted in ERISA's fundamental purpose and Congress'

overriding intent to protect employee retirement funds.[4] "ERISA is landmark legislation that subjects a wide variety of employee benefit plans to complex and far-reaching rules designed to protect the integrity of those plans and the expectations of their participants and beneficiaries." *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 929 (3d Cir. 1985) (discussing statutory framework of ERISA and top hat exception), *overruled on other grounds by Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993). ERISA's coverage extends to all employee benefit plans unless a plan falls within an exception to ERISA. *Demery*, 216 F.3d at 286-87. "[A] plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees," is exempt under the top hat exception (internal quotations omitted). *Id.* at 287, citing 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). If valid, a top hat plan is exempt from ERISA's participation, vesting,

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[4] 29 U.S.C. § 1001 sets forth Congress' findings and policy declaration underlying the establishment of ERISA. The declaration plainly emphasizes the statute's aim to protect employees' pension rights (such as vesting) by stating, for example: "that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans...and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness."

funding, and fiduciary provisions. *Demery*, 216 F.3d at 287.[5] Otherwise, these usual protections apply.

Acknowledging the protections afforded employees under ERISA, "Congress and the Department of Labor have determined that management and highly compensated employees who participate in unfunded deferred compensation plans do not need the same level of protection" as other workers and are therefore exempted from certain of ERISA's requirements. *Barrowclough*, 752 F.2d at 934, *citing* Reporting and Disclosure Requirements, 40 Fed. Reg. p. 34,530 (August 15, 1975) ("The class of employees with respect to whom this alternative method of compliance applies – highly compensated or management employees – generally have ready access to information concerning their rights and obligations and do not need the protections afforded them by Part 1 of Title I of the Act.") (other citations omitted). *See Alexander*, 513 F.3d at 43 ("Presuming that employees of this [top hat] statute can fend for themselves, Congress relaxed some of ERISA's prophylactic obligations."). Notably, however, bargaining power or ability to influence a plan is the only real mechanism for which an employee can fend for herself.

Recognizing the essence of ERISA's purpose, the Department of Labor, in light of the lack of detailed

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[5] When analyzing whether a plan satisfies the top hat exception, "it is important to note that ERISA is a remedial statute that should be liberally construed in favor of employee benefit fund participants. To that end, exemptions from ... ERISA coverage should be confined to their narrow purpose." *Guiragoss*, 444 F. Supp.2d at 659 (internal quotations and citations omitted).

legislative history, expressed its view that the top hat exemption can only apply to those employees who may influence a deferred compensation plan so as to avoid being taken advantage of by employers as had historically occurred prior to the enactment of ERISA:

> It is the view of the Department that in providing relief for "top-hat" plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I.

DOL Op. No. 90-14A.[6] (*App. 52a*). With approbation since the Department of Labor's 1990 pronouncement, courts have routinely relied on this practical and important interpretation in developing top hat jurisprudence. *See e.g.*, *Bakri*, 473 F.3d at 678; *In re*

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[6] The DOL is responsible for administering Title I of ERISA, but has published no regulations on top hat plans since ERISA's enactment in 1974. Michael Sirkin and Lawrence K. Cagney, Executive Compensation, §7.03[2] (2002). The First Circuit acknowledged that several courts have relied upon DOL Op. No. 90-14A as a basis for the "requirement that individual top-hat plan beneficiaries must have bargaining power." *Alexander*, 513 F.3d at 47 (*App. 19a*). Nevertheless, the First Circuit concluded that the statute does not require "proof of [bargaining] power of any sort." *Id.* at 48 (*App. 22a*).

IT Group, Inc., 448 F.3d 661, 665 N.1 (3d Cir. 2006); *Duggan*, 99 F.3d at 310; *Gallione v. Flaherty*, 70 F.3d 724, 729 (2d Cir. 1995); *Guiragoss*, 444 F. Supp.2d at 659; *Carrabba*, 38 F.Supp.2d at 477; *In re Silicon Graphics, Inc.*, 363 B.R. 690, 697 (S.D.N.Y. 2007); *Hollingshead v. Burford Equip. Co.*, 747 F. Supp. 1421, at 1429-1430 (M.D. Ala. 1990); *In re Battram*, 214 B.R. 621, 624-625 (C.D. Cal. 1997); *Fuqua v. Tarmac of America, Inc.*, 228 F. Supp.2d 755, 763 (E.D.Va. 2002); *Kemmerer v. ICI Americas, Inc.*, 842 F. Supp. 138, 144 (E.D. Pa. 1994).

Notably, in 2006, the *Guiragoss* court made *explicit* that an employee's bargaining power with respect to negotiating the terms of the plan was a "third requirement" for a valid top hat plan and thus a necessary factor in the "select group" analysis. As the *Guiragoss* court held:

> A *third requirement*, provided by *DOL advisory opinions*, is that the select group consist of individuals who are *in the position to protect their own interests*. This requirement helps ensure that ERISA's underlying objectives of ERISA are not undermined by the plan's exemption from specific ERISA requirements. Top hat plans were conceived as a way to free deferred compensation agreements for certain executives from the burden of ERISA regulation. The assumption underlying the top hat exemption from ERISA is simply that top-level executives are in a favorable bargaining position to negotiate the terms of an agreement and, therefore, do not need a comprehensive

> regulatory scheme, like ERISA, to protect their interests.

Guiragoss, 444 F. Supp.2d at 661 (emphasis added).

In 2007, the Sixth Circuit, in accord with *Guiragoss*, treated bargaining power as an element of the statute's "selectivity" requirement. *Bakri*, 473 F.3d at 680. Thus, the Sixth Circuit interpreted the "select group" language in the statute to encompass the rationale expressed by the DOL that participants in top hat plans have the ability to bargain with their employers concerning the design and operation of the plan.

The First Circuit's decision directly conflicts with the Sixth Circuit's decision in *Bakri* and its fundamental building blocks - - the DOL Opinion letter and evolving top hat law - - by holding that bargaining power is *not* part of the criteria to determine whether a plan qualifies for top hat status. *See Alexander*, 513 F.3d at 47 (*App. 19a*). In contrast to the Sixth Circuit's ruling, the First Circuit stated:

> [R]elying on that [DOL] letter to justify a nascent requirement that every employee covered by a top-hat plan possess the power to negotiate the terms of that plan is simply too much of a stretch. To our way of thinking, such a reading is both unwarranted and unpersuasive. Even without the additional requirement of individual bargaining power, Congress's enactment strikes us as a reasonable effectuation of its purpose. In any event, in limiting the top-hat provision to a "select group

> of management or highly compensated employees," Congress ensured that employees' interests would be sufficiently protected.
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> Although Congress' rationale for fashioning the exemption was that members of a "select group of management or highly compensated employees" could fend for themselves, the statute, by its terms, does not purport to require proof of power of any sort. In such circumstances, it would be highly unorthodox to convert a rationale (like the one set forth in the DOL opinion letter) into an independent statutory test.

Alexander, 513 F.3d at 47-28 (*App. 20a, 22a*).

Discounting the DOL Opinion and rejecting application of its rationale as "highly unorthodox" under *Skidmore* deference principles, the First Circuit summarily rejected the notion of bargaining power as an element of a valid top hat plan.[7] But, as this Court is well aware, where there is a lack of legislative

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[7] Other courts have taken the opposite approach. The *Guiragoss* court, for example, specifically noted that DOL Op. No. 90-14A is entitled to *Skidmore* deference and stated "that given the paucity of authority on top hat plans, other courts have also consulted the DOL advisory opinion letters for guidance." *Guiragoss*, 444 F. Supp.2d at 658-659 n. 11, *citing Gallione*, 70 F.3d at 729 (*citing* DOL opinion to explain Congress' intent when establishing top hat plan exemption); *Carrabba*, 38 F. Supp.2d at 479 (applying DOL opinion's top hat standard to evaluate plan).

history to evidence Congressional intent, an agency's policy statements may assist in interpreting the statute itself. *See e.g. Federal Express v. Holowecki*, -- U.S. --, 128 S. Ct. 1147, 1156 (2008). By way of further example, in *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1268 (11th Cir. 2008), the Eleventh Circuit reversed the trial court's ruling as to how "regular rate of pay" was to be calculated under the FLSA. Noting that the district court ignored the DOL's interpretive bulletin on the same issue and fashioned its own calculation, the Eleventh Circuit reversed based on *Skidmore* deference and adopted the method for calculating "regular rate of pay" set forth in the DOL's interpretive bulletin. *See also Connecticut Office of Protection and Advocacy For Persons With Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229, 239-240 (2d Cir. 2006) (upholding trial court's adoption of Department of Health and Human Services' interpretation of the word "facility" in the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801-10851); *Bolen v. Dengel,* 340 F.3d 300, 310 (5th Cir. 2003) (affirming trial court's adoption of the Executive Office of the U.S. Trustee's Handbook "expense first" policy of calculating expenses and compensation for U.S. Trustees because 28 U.S.C. § 586(e) was silent on the issue).

The First Circuit's implicit rejection of ERISA's purpose, its failure to apply the rationale in the DOL Opinion based upon *Skidmore* deference, and its contravention of many years of top hat law warrant review. As discussed below, the conflict between the First and Sixth Circuits on whether bargaining power is a requirement for a valid top hat plan has far-reaching implications for employees and the

forfeitability of their pension funds. Indeed, in less than two months since the First Circuit issued its decision, one court already followed the First Circuit and rejected the argument that bargaining power is a requirement for a valid top hat plan. *See Fishman v. Zurich Am. Ins. Co.*, --- F. Supp.2d ---, Case No. 05-C5227, 2008 WL 719221, at *13 n.3 (N.D.Ill. 2008). Intervention by this Court is necessary to avoid further confusion and vastly differing results in the courts on this issue.

II. The Importance of Bargaining Power as a Requirement for a Valid Top Hat Plan

Aside from the conflict between the circuits on the bargaining power issue, this matter presents a serious question of general importance because it impacts employees' rights to their pension funds, and forfeitability of those funds in particular. Indeed, this case exemplifies the importance of ensuring that employees who are subject to top hat plans have a real ability to fend for themselves and influence their employers regarding their deferred compensation plans. The irony of the First Circuit's decision is that it is undisputed that Dr. Alexander lacked bargaining power to negotiate the terms of the UDC and FRBP, yet he was forced to participate in these plans and ultimately forfeited his retirement funds because he had no vesting protection. *See Alexander*, 513 F.3d at 41 (*App. 6a*) ("he had no real opportunity to bargain over their terms"). The structure of the BSG Compensation Policy and the BSG plans reinforce that there was no ability for Dr. Alexander to negotiate the terms of the plans. According to the Compensation Policy, the amount of annual take-home compensation

must conform to limits set by Harvard University, and therefore, there was no opportunity for surgeons to negotiate a different mix of take-home and deferred compensation. (*App. 3a-6a*). In addition, neither the UDC nor the FRBP provided employees with an opportunity to negotiate for adequate security of benefits or other protections. (*Appendices D and E*). As the First Circuit conceded, a surgeon who is offered a position on the Harvard Medical School faculty through the BSG must agree to deferred compensation into the UDC and FRBP upon realizing certain income levels. *Alexander,* 513 F.3d at 41 (*App. 6a*).

Indeed, the BSG compensation scheme is structured in a manner and includes terms to which no employee would accede unless participation was mandatory. Unlike virtually every other "unfunded" top hat plan, the contributions that Dr. Alexander made were subject to immediate taxation. (*App. 65a-66a; 80a*). *See In re IT Group, Inc.*, 448 F.3d at 664 (main purpose of deferred compensation plan is to defer taxes until retirement when employee is in lower tax bracket); *Kemmerer v. ICI Americas Inc.*, 70 F.3d 281, 286 (3d Cir. 1995) (top hat plans "largely exist as devices to defer taxes"). Despite this, the funds that Dr. Alexander contributed to the plans were subject to BSG creditors and could be offset by BSG to cover any debts that BSG claimed against Dr. Alexander. (*App. 59a, 68a, 70a*). The plan gave Dr. Alexander neither the security of a funded plan nor the tax benefits of a truly unfunded deferred compensation plan. No employee with any bargaining power would have readily agreed to this arrangement without the ability to negotiate downside protections.

The issue of whether bargaining power is a requirement for a valid top hat plan has implications reaching far beyond this case. If this Court does not settle the issue, then employers will be free to structure plans that allow for forfeiture of employee pension funds by employees who have no say in the matter – like in Dr. Alexander's case. This result undermines the purpose of ERISA generally, and the top hat exemption specifically. Namely, employees covered by such plans cannot fend for themselves, thereby eviscerating the protections contemplated by ERISA.[8]

In sum, the First Circuit's holding that bargaining power is not an essential step in the top hat analysis contradicts Congress' broad intent, the justification for top hat plans as explained by the DOL, and most

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[8] The First Circuit assumed without deciding that "collective bargaining power might conceivably be a prerequisite for a top-hat plan" but at the same time noted its "grave doubts about the correctness of this assumption." *Alexander*, 513 F.3d at 48 (*App. 21a*). Even if there existed real collective bargaining power at the BSG, which Dr. Alexander vigorously contested, the *Carrabba* court rejected the concept of collective bargaining power, stating:

> The evidence does not persuade the court that any significant number of the participants in the MSP individually had bargaining power of that kind. Of course, as a group, to the extent that they could act cohesively, they undoubtedly could influence the design and operation of the MSP, but that would be true of any group of employees within a company.

Carrabba, 38 F. Supp.2d at 478. The Sixth Circuit favorably cited this language from the *Carrabba* decision. *Bakri*, 473 F.3d at 679.

significantly for purposes of this Petition, the Sixth Circuit and a long history of top hat case law that has adopted the DOL's interpretation of the top hat provision.

III. The First Circuit Conflicts With the Second and Sixth Circuits Regarding the Relevant Employees to Include in the "Select Group" Analysis

The First Circuit's decision in *Alexander* creates yet a second conflict among the circuits regarding which employees are to be included in measuring the "select group" for purposes of a top hat analysis. The First Circuit held that only employees who actually contribute to the plans should be included in the analysis. This ruling conflicts specifically with the Second Circuit *Demery* decision and the Sixth Circuit *Bakri* decision which both measure "select group" based upon to whom the plan is offered or who is invited to join the plan.

As the evolution of top hat cases shows, the "select group" requirement under the top hat exemption, "must be met both quantitatively and qualitatively." *In re IT Group*, 305 B.R. at 410; *Demery*, 216 F.3d at 288. The Sixth Circuit explained the test as follows:

> In determining whether a plan qualifies as a top hat plan, we consider both qualitative and quantitative factors, including the percentage of the total workforce invited to join the plan (quantitative), (2) the nature of their employment duties (qualitative), (3) the compensation disparity between top hat plan

> members and non-members (qualitative), and (4) the actual language of the plan agreement (qualitative).

Bakri, 473 F.3d at 678, 680 (reversing and remanding summary judgment entered for employer because plan did not meet "the 'selectivity' requirements of §1051(2)") (emphasis added).

The qualitative factor is simply not at issue on this Petition. With respect to the quantitative component of "select group" analysis, the Second Circuit has set the bar at 15% so that a plan covering more than 15% of employees is likely not a valid top hat plan. *In re IT Group*, 305 B.R. at 410, *citing Demery*, 216 F.3d at 287 (holding deferred compensation plan offered to 15.34% of employees qualified for top hat status but noting "this number [15.34%] is probably at or near the upper limit of acceptable size for a 'select group'..."). *See also Darden*, 717 F. Supp. at 396-97 (finding that 18.7%, or one-fifth, of total workforce "too large to be considered 'select' for purposes of the top-hat exemption"). By definition, a plan that covers all management or all high level employees is not select and is therefore invalid. *See* Ridgeley A. Scott, Rabbis and Other Top Hats: The Great Escape, 43 Cath. U. L. Rev. 1, 9 (1993) ("An adequate group must be select, which means that a group cannot cover all management and highly compensated employees.").

The Second Circuit's *Demery* decision requires a brief explanation. In *Demery*, bank officers challenged the validity of the defendant bank's deferred compensation plans, arguing that because the plans were offered to more than 15.34% of the bank

employees, they were not offered to a "select group." *Demery*, 216 F.3d at 289. The Second Circuit measured the "select group" by the percentage of employees to whom the deferred compensation plan was offered (15.34%) as opposed to those who actually participated in the plan:

> The Plan was *offered* to assistant vice-presidents, managers, and other senior officers, representing approximately 15% of the workforce of Extebank. Approximately 7 to 10% of Extebank employees actually participated in the Plan, which allowed participants to defer up to 25% of their salary as contributions to the Plan.
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> ...Plan B was *offered* to 15.34% of Extebank employees... this number is probably at or near the upper limit of the acceptable size for a "select group," . . .

Demery, 216 F.3d at 285, 289 (emphasis added). Like *Demery*, the Sixth Circuit looked to the number of employees who were "invited to join the plan" in determining the select group. *Bakri*, 473 F.3d at 678.

The First Circuit decision directly conflicts with the Second and Sixth Circuits by counting only those surgeons who actually received contributions to the plans (*i.e.* those surgeons whose NPI exceeded the Harvard salary cap in a given year) to define the "select group." *Alexander*, 513 F.3d at 44 (*App. 12a*) ("Common sense suggests that it is this small fraction

[surgeons with a surplus] that should be taken into account in determining the composition of the select group for whom the plans were maintained."). Based on the conflict in the circuits, review by this Court is warranted to set the appropriate standard by which to measure a "select group" for purposes of the top hat analysis.

The measure used by the Second and Sixth Circuits to include all employees who *possibly* could contribute to the plans is more appropriate than the First Circuit's measure, which includes only those who *actually* contribute to the plans.[9] This is because the plans were "maintained" for all surgeons rather than just those who achieved a practice surplus. *See* 29 U.S.C. § 1051(2) (plan must be "maintained" for a "select group"). The proof is in the structure of the BSG compensation scheme. Indeed, the plans were used as a recruitment and retention tool to secure top doctors. (*App. 3a*). Once hired by BSG, *all* doctors were provided with information about the plans. (*App. 5a-6a*). And any doctor whose NPI exceeded the salary cap would be *required* to participate in the plans. (*App. 4a, 6a*). Thus, as the First Circuit conceded, all surgeons were potentially eligible to contribute to the plan in any given year. *Alexander*, 513 F.3d at 40-41 (*App. 4a-5a*).

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[9] The First Circuit noted that the percentage of the workforce who was covered by the plans (approximately 30%) is hardly "select." *Alexander*, 513 F.3d at 44 (*App. 11a-12a*). That high percentage, moreover, far exceeds the 15.34% ceiling established by the Second Circuit in *Demery*. 216 F.3d at 287-288.

The fact that all surgeons not only could, but were required, to contribute to the plans if they exceeded the Harvard salary cap further supports that the BSG plans were not "maintained" for a "select group." Said differently, the fact that participation in the plans was mandatory versus optional as in *Demery* underscores that the plans were not maintained for a select group. Rather, the plans were offered to all surgeons from the inception of their employment and were "maintained" for all surgeons as part of BSG's compensation scheme. The undisputed facts that (i) each doctor received information about the plans at the start of his or her employment, (ii) the plans were incorporated into BSG's Compensation Policy that governed all doctors, (iii) the plans were used as recruitment and retention tools by the BSG, and (iv) no doctor had a choice about contributing to the plans, demonstrate that the plans were offered to all surgeons and "maintained" for all of them in the event their net practice income exceeded the Harvard salary cap.

The First Circuit's attempt to distinguish *Demery* actually highlights that the BSG plans were "maintained" for all surgeons. *Alexander*, 513 F.3d at 44 (*App. 13a*) ("This conclusion is not at odds with the case law."). The First Circuit pointed out that in *Demery, Guiragoss,* and *Carabba*, the ability to fund the plan always existed because it was based on every member receiving some benefit (like a commission) or the plan was funded as a matter of discretion. *Id.* In this case, however, the mandatory nature of the compensation scheme required all surgeons to contribute to the plans if their salary exceeded the Harvard cap. This mandated participation for all surgeons undercuts that the plans were maintained for

only a smaller subset who received contributions into the plans. In fact, no one knew at the start of each year who would exceed the salary cap, and therefore, the plans had to be "maintained" for anyone and everyone who did.

The *Demery* test also protects against a plan morphing in and out of top hat status year to year – an inherent risk if the measure is who actually contributes to the plans as opposed to all employees who are covered by the plans. Administering such morphing plans would be impossible because some years the plans would be exempt from certain requirements under ERISA and other years they would not. More importantly, employees' rights would be jeopardized as a result of not knowing whether the plans fit the top hat exemption, and whether their funds would be subject to forfeiture.

Further, the First Circuit's measurement of "select group" as only those employees who actually contribute to the plans is disconnected from the underlying rationale for the top hat exemption that employees can protect themselves. This is because, under this measure, the "select group" constantly changes and every year presents a clean slate to the employer concerning who will receive contributions to the plans (in this case, based on NPI). As a result, the same employee, or doctor, may be included in the "select group" in one year and out the next. Such unpredictability and lack of continuity cuts against the rationale of the top hat exemption that the individuals who comprise the "select group" are capable of protecting their own interests and have the ability to bargain with their employer. Looking to whom the

plan is offered at a particular point in time, (*e.g.* at the beginning of the calendar year) to define the "select group" -- as the Second and Sixth Circuits have done -- places an employee in a better position to bargain with her employer and therefore, is more consistent with the purpose of the top hat exemption.

A. The Statutory Definition of "Participant" Should Apply in the "Select Group" Analysis

The Second Circuit in *Demery* implicitly adopted the reasoning of the *Darden* court, which held that employees who "may become eligible to receive a benefit" in accordance with the statutory definition of "participant" must be counted in the "select group" analysis. *See Demery*, 216 F.2d at 288, *citing Darden*, 717 F. Supp. at 396. The First Circuit rejected *Darden's* reasoning and limited the "select group" to those who actually received a benefit. *Alexander*, 513 F.3d at 45 & n. 8 (*App. 16a*).

In *Darden*, the dispute centered around which insurance agents should be counted as participants in the plan for purposes of determining whether they comprise a "select group." 717 F. Supp. at 396. The defendant, Nationwide, argued that only those agents who had completed five years of service should be counted as plan participants. *Id.* Rejecting Nationwide's position, the *Darden* court noted that ERISA's definition of "participant" which includes all employees who "may become eligible" is the more appropriate method of determining the select group. *Id.* The *Darden* court noted:

> [T]he distinction between vesting and eligibility requirements is irrelevant for determining who is a plan participant under ERISA, since included within the statutory definition of "participant" are employees who "may become eligible to receive a benefit." Thus, those employees who have not satisfied the eligibility requirements for the plan must still be counted as "plan participants" if they *may* satisfy those requirements. **In other words, the relevant question is not whether the employee *has* satisfied the eligibility requirements, but whether he is *eligible* to satisfy the eligibility requirements.**

Id. (emphasis in original and bold emphasis added). Accordingly, the *Darden* court held that those agents who had entered into the standard agent's agreement, even if they had not completed five years of service, must be counted for purposes of the "select group" analysis. *Id.* at 396-97.

Other courts have followed *Darden's* "select group" analysis. For example, in *Simpson v. Ernst & Young*, 879 F. Supp. 802, 816 (S.D.Ohio 1994), the court held that one need not be "presently eligible" for benefits to be a "participant" under ERISA:

> . . . an ERISA plan participant does not have to be presently eligible to receive plan benefits. The fact that Simpson had not yet attained the age or years of service requirements does not mean that he was not a participant. To hold otherwise would limit ERISA protection only to

> those who have already vested or have obtained nonforfeitable rights to pension benefits.

Id., citing 29 U.S.C. § 1002(7) (emphasis added)). The First Circuit refused to adopt this reasoning, stating:

> [Our] holding defeats the appellant's reliance on *Darden v. Nationwide Mut. Ins. Co.*, 717 F. Supp. 388 (E.D.N.C. 1989), *aff'd*, 922 F.2d 203 (4th Cir. 1991), *rev'd on other grounds*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992). *Darden* rested squarely on an erroneous holding that the "participant" definition should be transplanted root and branch into the top-hat exemption. *See id.* at 396-97.

Alexander, 513 F.3d at 45 n.8 (*App. 16a*).

The First Circuit's conclusion that the BSG plans were limited to a "select group" contradicts the undisputed fact that all BSG surgeons "were *potentially* eligible to contribute to the plans..." *Alexander*, 513 F.3d at 40-41 (*App. 16a*) (emphasis added). If all surgeons had the *potential* to contribute to the plans, then all surgeons "may become eligible" to contribute to the plans, which is in accord with the statutory definition of "participant."[10]

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[10] The First Circuit's reliance on *Duncan v. Walker*, 533 U.S. 167, 173 (2001) is not dispositive of this issue. As the Court has recognized, the principle set forth in *Duncan* has its limitations. For example, in *Burns v. United States*, 501 U.S. 129 (1991), the Court acknowledged that although Fed. R. Crim. P. 32 was silent as to whether the district court needed to provide notice that it was going to make an upward departure from the federal

B. The First Circuit Failed to Credit the Plan Language

In addition, the term "Participant" as it appears in the FRBP is capitalized and, fairly read, indicates that the drafters intended the term to refer to ERISA's statutory definition of "participant" which includes employees who "may become eligible" for benefits. *See Progressive Cas. Ins. Co. v. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 47 (2d Cir. 1993) ("The use of capitalized letters in the phrase 'Subject to Facultative Reinsurance Agreement' indicates to any reasonable person that a specific document is being referenced.") (emphasis in original). *Cf. In re Winn-Dixie Stores, Inc.*, 356 B.R. 813, 815 n. 2 (M.D. Fla. 2006) (noting that any term not defined in the plan of reorganization or court's order shall have the meaning given to that term in the Bankruptcy Code or Rules). The First Circuit refused, however, to assign any meaning to the capitalized term, reasoning that "a scrivener's choice of plan language cannot be allowed to control the more general interpretive inquiry into what the statute requires." *Alexander*, 513 F.3d at 45 (*App. 16a*).

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sentencing guidelines, it would read such a requirement into the rule based on "the textual and contextual evidence of legislative intent" because in the absence of notice, the right to be heard has "little reality or worth." *Id.* at 136. *See also Field v. Mans*, 516 U.S. 59, 76 (1995) (refusing to interpret statute's silence as Congressional intent to exclude reasonableness requirement and noting that the pregnant rule of construction is not absolute and is at its "weakest when it suggests results strangely at odds with other textual pointers.").

Likewise, the First Circuit failed to address the eligibility language of the BSG plans in its analysis at all. Instead, the First Circuit simply acknowledged that the plans covered all surgeons without affording any weight to this critical fact. *Alexander*, 513 F.3d at 41 (*App. 6a*) ("At that time – and at all times material to this case – the plans covered all full-time BSG surgeons who held Harvard faculty appointments.") The First Circuit's ultimate conclusion - - that only surgeons who actually contribute to the plans comprise the "select group" - - is at odds with the plain language of the plans which cover all surgeons. Thus, the First Circuit decision also raises an important question concerning the effect of plan language in the top hat analysis.[11] *Compare Bakri*, 473 F.3d at 680 (plan language must be considered in "select group" analysis).

IV. The Detrimental Impact on Employees Under the Current Unsettled State of Top Hat Law

The First Circuit decision exposes countless employees to vast uncertainty regarding their status as participants in top hat plans. The First Circuit

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[11] Courts emphasize "the centrality of the plan documents" in analyzing an ERISA claim. *Forcier v. Metropolitan Life Ins. Co.*, 469 F.3d 178, 183-184 (1st Cir. 2006) (citations omitted). A primary purpose of ERISA is to ensure the integrity and primacy of the written plans and, therefore, the plain language of an ERISA plan must be given its literal and natural meaning. *Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 279 (1st Cir. 2000) (citation omitted). The First Circuit's decision contravenes these principles.

decision permits a retrospective, after-the-fact analysis to define the "select group" that is entirely inconsistent with the policy underlying top hat plans -- *i.e.* to limit participation to certain individuals who do not require all of ERISA's protections and have the power to negotiate with their employer about the terms of their deferred compensation plans. *See e.g. Gallione*, 70 F.3d at 727. If, under the First Circuit's test, it cannot be discerned who the "participants" are until after the earnings for a particular year, then how can it possibly be that the plans were "maintained" for a "select group?" Likewise, how could it be said that the "select group" possessed bargaining power to negotiate with their employer about the terms of the plans when the group is not defined until after the annual salaries are calculated? Participation must be gauged at the point at which the plan becomes relevant to one's employment, that is, when an employee would be able to affect its terms. Here, that point is when a physician is hired because it is impossible to know if in a particular year, he or she would receive a deferral. Identifying the participants of the "select group" after the fact and refusing to require bargaining power as an element of a valid top hat plan turns the top hat exemption on its head.

The better course has been set by the decisions of the Second and Sixth Circuits with respect to bargaining power and the employees who should be included in the "select group" analysis. This Court should resolve these issues to prevent further discord among courts over the criteria to determine whether a top hat plan is valid.

In sum, employee pension rights are an important matter of federal law which call for a uniform body of law, not more or less favorable treatment of employees depending upon the jurisdiction in which they reside. (Indeed, had this case been decided by the Eastern District of Virginia, Dr. Alexander would have not been required to forfeit his retirement funds because the BSG plans would have been struck down for lack of bargaining power.) Accordingly, ERISA's primary purpose of protecting employee pension funds coupled with preemption principles warrant this Court's review to resolve the current conflicts among the circuits and settle these important questions of federal law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant review of this matter.

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